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NATIONAL TOBACCO COMPANY, LP

11
12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION
15

16 RAYMOND RILEY p.k.a. Boots Riley,
SOLOMON DAVID and MARLON IRVING
17 p.k.a. Lifesavas,

18 Plaintiffs,

19 v.

20 NATIONAL TOBACCO COMPANY LP,

21 Defendant.
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Case No. C-08-01931 JSW

**REPLY DECLARATION OF MATT
McDONALD IN SUPPORT OF MOTION
TO DISMISS, STAY OR TRANSFER BY
DEFENDANT NATIONAL TOBACCO
COMPANY**

Date: June 20, 2008
Time: 9:00 a.m.
Courtroom: 2, 17th Floor
Before: The Honorable Jeffrey S. White

[FILED VIA E-FILING]

1 I, Matt McDonald, declare as follows:

2 1. I am Vice President, Artists and Events CMJ Network, Inc., which acts as an agent
3 for defendant National Tobacco Company, L.P. ("NTC") and runs NTC's Zig-Zag® Live
4 ("ZigZagLive") promotions. I have personal knowledge of the matters set forth herein, and, if called
5 as a witness, I could and would testify competently thereto.

6 2. I understand that in a declaration filed in this matter, Paul Peck contends that he never
7 represented to anyone that he had authority to enter agreements on behalf of Plaintiffs Raymond
8 Riley or Lifesavas, and that the Artist Sponsorship Agreement had nothing to do with Plaintiffs
9 Raymond Riley or Lifesavas.

10 3. As indicated in my earlier declaration, I negotiated with Tom Chauncey, Galactic
11 Funk Touring Inc.'s booking agent, and Paul Peck for ZigZagLive to sponsor four performances in
12 specific markets: New York, Boston, Raleigh, and Athens, Georgia that occurred in the Fall of 2007.

13 4. In dealing with Tom Chauncey, he told me that the artists were enthusiastic about the
14 sponsorship because it would help the tour break even or be profitable.

15 5. Mr. Chauncey also told me in the course of negotiating the Agreement (which was
16 attached as Exhibit A to my previous declaration in this matter) that the touring party was called
17 Galactic Funk Touring, Inc. ("Galactic Funk"), so that the Agreement should list Galactic Funk
18 Touring Inc., rather than "Galactic" as a party.

19 6. Tom Chauncey then referred me to Paul Peck, who directed me to the Galactic Funk
20 website www.galacticfunk.com/presskit for ad mats and artwork.

21 7. Those materials on the "Galactic Funk" website included the names and likenesses of
22 Plaintiffs – that is, Boots Riley and Lifesavas.

23 8. It was through Mr. Peck indicating that I should use the artwork referring to all of the
24 performing artists on the enumerated tour dates, including Plaintiffs in this action, that I understood
25 the identities of all the artists who would be performing as, and sponsored in, the "Galactic Funk"
26 touring group on the ZigZagLive tour.

27 9. As stated in my previous declaration, Mr. Peck provided specific direction as to how
28 all of the artists – Galactic, Lifesavas and Boots Riley – should be portrayed on the promotional

1 materials. See Ex. B, C to my earlier declaration.

2 10. Based upon these representations and other matters stated in my previous declaration,
3 I understood that Galactic Funk was the touring group as a whole. I further understood that Mr.
4 Peck and Mr. Chauncey were acting as agents for the “Galactic Funk” touring group as a whole.

5 11. Specifically, neither Peck nor Chauncey ever informed me that they did not have
6 authority to represent all of the performing artists in the touring group with regard to the ZigZagLive
7 tour. Nor did either of them tell me that I should contact anyone else to seek approval for use of the
8 artists’ names and likenesses. Instead, Peck specifically approved ZigZagLive promotional
9 materials identifying all of the artists performing in the sponsored performances, including Plaintiffs.

10 12. ZigZagLive’s promotional materials and website referring to Plaintiffs used names,
11 likenesses and links to Plaintiffs’ own web pages that were obtained from the Galactic Funk website
12 to which Peck referred me. We did not create the references to Plaintiffs ourselves – the ZigZagLive
13 promotional materials were created using the template provided by Galactic Funk that contained
14 references to Plaintiffs.

15 13. The ZigZagLive website also had blogs and show reviews of the sponsored
16 performances, as well as a drop down menu which directs viewers to a “poster” section on which
17 fans may apply to receive autographed posters of the artists who appeared on the ZigZagLive tour.

18 14. I understand that in declarations filed in this matter, Plaintiffs Boots Riley and Marlon
19 Irving and Solomon David of Lifesavas assert that they may have “briefly socialized with the
20 representatives of CMJ – who were apparently working for National Tobacco Company.”

21 15. The implication in the above statement that the CMJ representatives did not clearly
22 identify themselves with Zig-Zag® products and ZigZagLive is false.

23 16. The promotional tables that were present during Plaintiffs’ shows had ZigZagLive
24 and Zig-Zag® banners and merchandise. Exhibits A and B hereto are true copies of two
25 photographs of the ZigZagLive promotional material display table at the Raleigh, North Carolina
26 performance by the Galactic Funk touring group, including Plaintiffs Boots Riley and Lifesavas,
27 that I attended.

28 17. As Vice President, Artists and Events for CMJ, I have access to CMJ’s files

1 concerning the ZigZagLive sponsored performances. Exhibits C and D hereto are true copies of two
2 photographs from CMJ's files of the display table at the New York, New York performance by the
3 Galactic Funk touring group, including Plaintiffs.

4 18. As the photographs make clear, the promotional displays at the concert venues feature
5 both ZigZagLive and Zig-Zag® products in an obvious and prominent manner.

6 19. As part of the promotion under the Agreement, ZigZagLive representatives asked the
7 artists performing at shows to sign ZigZagLive posters for the performances to be given away to fans
8 at the shows and also to be featured and given away to fans through the ZigZagLive website.

9 Exhibit E hereto is a true copy of a screenshot from the "posters" section of the ZigZagLive website.

10 20. I have seen the posters that Boots Riley, and Solomon David and Marlon Irving all
11 willingly signed, which prominently feature the ZigZagLive logo. Exhibit F hereto is a true copy of
12 such a poster signed by Plaintiff Boots Riley. Exhibit G hereto is a true copy of such a poster signed
13 by Plaintiffs Solomon David and Marlon Irving as Lifesavas.

14 21. The "Galactic" posters (like those that were autographed and signed by Plaintiffs) are
15 also displayed prominently on the ZigZagLive tables. *See* Exs. A-D.

16 22. I spoke to Plaintiffs Solomon David and Marlon Irving at the Raleigh show. When
17 they stopped by the ZigZagLive table, they asked what we – the CMJ/ZigZagLive representatives –
18 were doing there. I told them we were there for ZigZagLive, which was sponsoring some of the
19 shows on the tour.

20 23. Rather than showing "surprise" or "alarm" at the affiliation with ZigZagLive, they
21 indicated to me that ZigZagLive's participation was cool.

22 24. Based upon my personal interaction with Lifesavas at the Raleigh show, the size and
23 nature of the ZigZagLive promotion, and the fact that all Plaintiffs willingly autographed
24 ZigZagLive promotional posters – all of which occurred in 2007 – I find it incredible that they claim
25 to have only recently (*i.e.*, in 2008) "discovered" ZigZagLive's use of their names and likenesses.

1 I declare under penalty of perjury under the laws of the United States of America that the
2 foregoing is true and correct and that this declaration was executed on June 5, 2008 at New York,
3 New York.

4 
5 Matt McDonald





1-JSW

Document 31-4

Filed 06/06/1

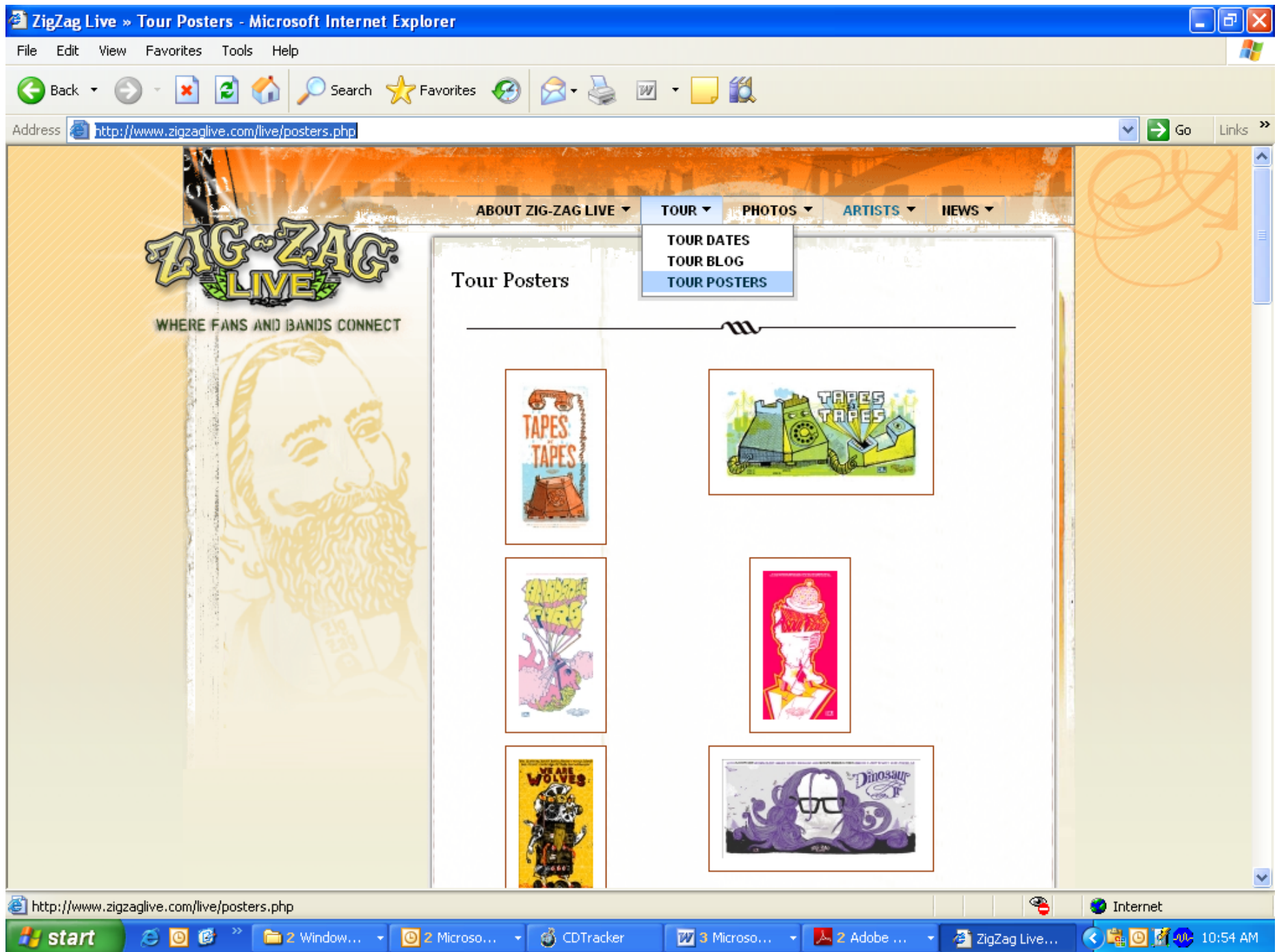


1-JSW

Document 31-5

Filed 06/06/2

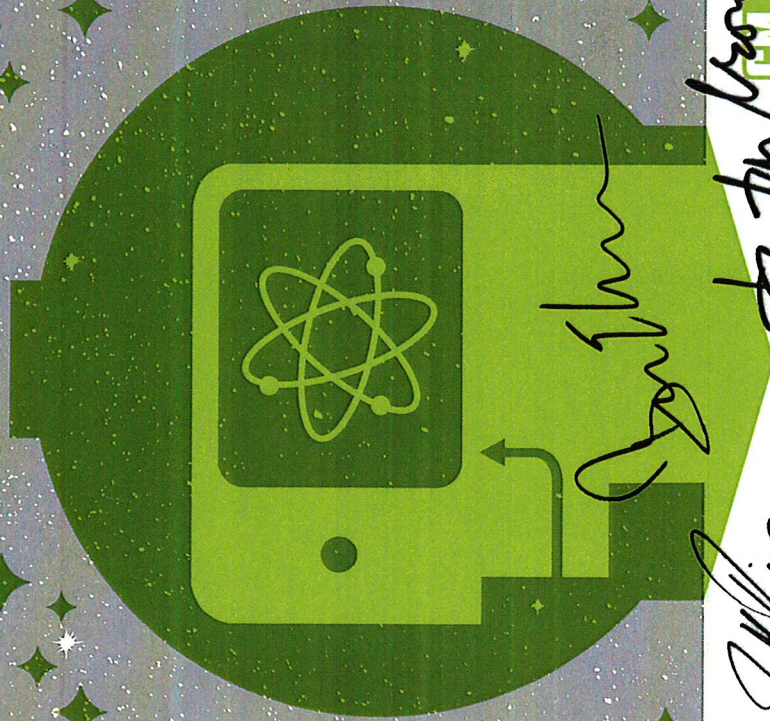




GALACTIC

WITH MR. LIF AND BOOTS RILEY (OF THE COUP) & LIFSAVAS

Mr. Lif
Boots Riley
Mr. Lif
Boots Riley



Mr. Lif
Boots Riley
Mr. Lif
Boots Riley

11.02.07 • GEORGIA THEATRE • ATHENS, GA 11.06.07 • THE LINCOLN THEATRE • RALEIGH, NC 11.17.2007 • ROSELAND BALLROOM • NEW YORK, NY 11.18.07 • PARADISE ROCK CLUB • BOSTON, MA • PLUS SPECIAL GUEST CHALI 2NA (OF JURASSIC 5)

